No. 76-750

Supreme Court of the United States

OCTOBER TERM, 1977

SEARS, ROEBUCK AND CO.

Petitioner,

v.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

The citations to the opinions below and the basis of this Court's jurisdiction are set forth at pp. 1-2 of the petitioner's brief. In addition to the statutes cited at Pet. Br. 2, the following are relevant: § 527.3, California Code of Civil Procedure; §§ 552.1, 555.2, and 602(1), California Penal Code. They are set out at pp. 11-17 *infra*.

QUESTIONS PRESENTED

1. Whether consideration by this Court of the labor law preemption question raised by petitioner is appropriate when the California Supreme Court has yet to decide if the injunction sought is proper under state law and there are compelling indications that it is not.

2. Whether a state court may enjoin as a trespass peaceful, non-obstructive picketing which is arguably protected by federal law under the decisions of this Court and of the

NLRB accommodating the rights stated in § 7 of the NLRA and property rights.

STATEMENT OF THE CASE

The California Supreme Court accurately and succinctly set out the nature and sequence of the state court proceedings in this case, the underlying facts, and of the basis of its decision denying petitioner, Sears, Roebuck and Co., the relief it sought, as follows:

> "Defendant San Diego County District Council of Carpenters (Union) appeals from an order granting a preliminary injunction restraining defendant, its officers, agents, representatives and members from picketing on the property of plaintiff Sears, Roebuck & Company (Sears), but permitting them to picket on the public sidewalks adjacent to Sears' private property.
>
> "Sears operates a retail department store on property which it owns in Chula Vista, San Diego County. The store building itself is centered on the large, rectangular-shaped piece of land. Walkways abut on the building on all four sides; these in turn are surrounded by a large parking area. All of the walkways and the entire parking area are located on Sears property which on its external limits is bounded on three sides by public sidewalks and streets, and on the fourth by private residences separated from the store property by a concrete wall. Sears' store is the only building on the premises.
>
> "Defendant Union is a labor organization created for the purpose of negotiating terms and conditions of employment on behalf of certain employees in the carpentry trades.
>
> "In October 1973, the Union was informed by one of its members that Sears was having carpentry work done in its Chula Vista store. On October 24 two business representatives of the Union visited the store and determined that platforms and other wooden structures were being built by carpenters who had not been dispatched from the Union's hiring hall, that the work was covered by the master agreement between the Union and the Building Trades Council of San Diego County and that the men engaged in it came within the classification of journeymen carpenters. Later the same day representatives of the Union met with the Sears' store manager and requested that Sears either contract the work through a building trades contractor who would use dispatched carpenters, or in the alternative, sign a short form agreement obligating Sears to abide by the terms of the Union's master labor agreement with respect to the dispatch and use of carpenters on the job. The manager indicated that he would consider the matter, but despite repeated inquiries by the Union, he never responded.
>
> "On the morning of October 26, the Union established picket lines on plaintiff's property. Pickets patrolled on the parking lot areas immediately adjacent to the walkways abutting the sides of the building. They carried signs indicating that they were AFL-CIO pickets sanctioned by the 'Carpenters' Trade Union.' It is not disputed that at all times while they were on Sears' property the pickets conducted themselves in a peaceful and orderly fashion. The record discloses no acts of violence, threats of violence, or obstruction of traffic. The security manager of the store requested that the pickets be removed from Sears' private property, but the Union's business representative refused, stating that the pickets would not leave unless compelled to do so by legal action.
>
> "On October 29, Sears obtained a temporary restraining order enjoining the Union, its agents, representatives and members from picketing on Sears' property. The Union complied by removing its pickets

to the public sidewalks adjacent to, but outside of, the property. Sears claimed that while the Union was picketing on the public sidewalks, certain deliverymen and repairmen refused to cross the picket-lines to service the Sears store. The Union, on the other hand, asserted that its pickets on the public sidewalks were ineffective because they were too far away from the store. As a result, on November 12, 1973, the Union moved its pickets allegedly because of their ineffectiveness. The pickets never returned.

"On November 21, 1973, the superior court granted a preliminary injunction restraining the Union, its officers, agents, representatives and members from 'causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property. . . .' The court expressly declared, however, that 'this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, 'H' Street and 'I' Street which are adjacent to the private property of plaintiff.' This appeal followed.

"Although the Union launches several related attacks on the trial court's injunction, essentially its main contention is that the court did not have the subject matter jurisdiction of the underlying labor dispute and thus was devoid of all judicial power to enjoin the picketing. We are satisfied that this contention has merit. We shall point out that federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board (Board) and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property. Accordingly we reverse the order granting the injunction." (Pet. App. A31-A33.)

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal question in this case is whether a state court may enjoin as a trespass peaceful, non-obstructive picketing, which is arguably protected by federal law under the decisions of this Court and of the National Labor Relations Board accommodating the rights stated in § 7 of the National Labor Relations Act and property rights. The factual situation in which that question arises is such peaceful picketing by a union on privately-owned walkways at the entrance to a store which are separated from the nearest publicly-owned walkways by extensive parking lots, where the owner is the employer involved in a labor dispute with that union. Our discussion throughout will refer solely to this "generic situation." (*Hudgens* v. *NLRB*, 424 U.S. 507, 522.)

In point I of our argument we show that resolution of this question in the present context would be premature. For, the California Supreme Court has yet to decide whether the injunction is proper under *state* law, and there are compelling indications in the applicable state cases and statutes, all of which we review, that it is not. If state law would not permit either the injunction in question to continue in effect, or allow an injunction under similar circumstances to be issued in the future, no possible conflict with federal labor policy could arise. As this Court stated in *San Diego Unions* v. *Garmon*, 359 U.S. 236, 239, the question of whether the NLRA preempts state law can "not be appropriately decided until the antecedent state law question [is] decided by the state court."

In point II we show that if *Garmon* does not control the

procedural aspects of this case, it assuredly controls the merits. As petitioner points out (Pet. Br., 7), the central holding of *Garmon* is:

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (359 U.S., at 244.)

Petitioner does not, and could not, suggest that the activity here at issue is not arguably protected by the NLRA. For, the NLRB in a strikingly similar case has just ruled that the property right of the owner of the "privately owned * * * walkways * * * essentially open to the public [and] the equivalent of sidewalks" at the entrance to the store which is the scene of a labor dispute is subordinated to the § 7 "right to picket immediately in front of" the store and not at "such a distance from the focal point [of the dispute] * * * that a message announced orally or by a picket sign would be too greatly deluded to be meaningful." (*Scott Hudgens*, 230 NLRB No. 73, 95 LRRM 1351, 1354.) And, in so doing the Board was implementing this Court's mandate in *Hudgens* v. *NLRB*, 424 U.S., at 521-523. Nevertheless, Sears maintains that the states' interest in enforcing their trespass laws comes within an exception to *Garmon*, which preserves to the states the right to regulate activity which "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (359 U.S., at 244.) But this Court has never recognized an exception to *Garmon* where the activity involved is arguably *protected* by federal law rather than arguably prohibited. For to do so

would be to allow "the greatest threat against which the *Garmon* doctrine guards, a state's prohibition of activity that the [NLRA] indicates must remain unhampered." (*Hanna Mining* v. *Marine Engineers*, 382 U.S. 181, 193.)

The exception to the *Garmon* doctrine which permits the states to advance interests "deeply rooted in local feeling" is applicable only where there is "no risk that permitting the state cause of action to proceed would result in regulation of conduct that Congress intended to protect." (*Farmer* v. *Carpenters*, ... U.S. ....., 45 L.W. 4263, 4265.) We conclude point II by demonstrating that in this case there is a substantial risk that enforcement by the states of their trespass laws would result in injunctions against "conduct that Congress intended to protect."

Finally, in point III we answer Sears' argument that the states should have concurrent jurisdiction over cases such as the instant one in order to assure the property owner a "remedy for illegal trespass." (Pet. Br., 14-18.) As we show: this argument is merely a restatement of the contention that the portion of the *Garmon* doctrine preempting state regulation of conduct "arguably protected" by § 7 should be overruled; and this Court has three times in the past seven years considered invitations to modify or overturn the *Garmon* doctrine and has chosen instead to "reaffirm * * * the general rule set forth in *Garmon*" (*Farmer*, 45 L.W. at 4265). We conclude this portion of our argument by noting that even if the Court were to conclude that the interest in assuring employers a forum in a case such as this should be given greater weight than it is presently afforded that conclusion does not lead to the concurrent jurisdiction rule sought by Sears. The suggestion in this regard that we develop is that at the least state

jurisdiction to enjoin alleged trespasses should be pre-empted where peaceful picketing by a union takes place on privately owned walkways at the entrance to a premises which are widely separated from the nearest publicly owned walkways, and where the owner is the employer (or his lessor) involved in a labor dispute with that union, so long as the union responds to an employer, who believes that the picketing at that location is not protected by federal law and who demands that the pickets leave, by filing a § 8(a)(1) charge against the employer with the NLRB, thereby assuring *Board* consideration of the employers' contention.

ARGUMENT

I.

1. The question petitioners seek to have this Court resolve turns on the proper application of the preemption doctrine announced in *San Diego Unions* v. *Garmon*, 359 U.S. 236. Since the doctrine announced in *Garmon* is central to this case, the circumstances preceding that decision are particularly pertinent.

The *Garmon* case was twice before this Court. As the Court explained in *Garmon I* (*San Diego Unions* v. *Garmon*, 353 U.S. 26, 28), the controversy concerned:

> "an order enjoining the unions from picketing or exerting secondary pressure in support of their demand for a union shop agreement unless and until one or another of the unions had been designated as the collective bargaining representative of respondents' employees [and] award[ing] respondents $1,000 damages."

On the basis of the companion decisions in *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, and *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, the Court vacated the state

court injunction. (353 U.S., at 28-29.) But, as the Court noted in *Garmon II*:

> "[S]ince it was not clear whether the judgment for damages would be sustained under California law, [the Court] remanded to the state court for consideration of that local law issue. *The federal question*, namely, whether the National Labor Relations Act precluded California from granting an award for damages arising out of the conduct in question, *could not be appropriately decided until the antecedent state law question was decided by the state court.*" (359 U.S., at 238-239, emphasis supplied.)

The need for a definitive determination of state law in these circumstances before "[t]he federal question • • • [can] be appropriately decided" is inherent in the issues with which the *Garmon* doctrine is concerned. For, "[i]n determining the extent to which state regulation must yield to subordinating federal authority, [the Court has] been concerned with delimiting areas of potential conflict • • •" (*id.*, at 241-242)—that is, "with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered" (*id.*, at 246-247). If the state does not in fact prohibit the disputed conduct claimed to be protected by the NLRA, there is no potential for conflict, no possible interference with national labor policy, and therefore no federal question to resolve. This is the reason the Court remanded *Garmon* for a determination of state law and decided the preemption question only after it was certain that there was a possible conflict with federal law.

2. The question whether California law permits injunctions based on its trespass laws against peaceful picketing by a union in support of its position in a labor dispute and conducted upon property which, while pri-

vately owned, is open to the general public, is substantial. Indeed, respondent vigorously argued to both the California Court of Appeal and to the California Supreme Court that the injunction was contrary to state statutory and decisional law; while the Court of Appeal decided otherwise (Pet. App. A12), the Supreme Court did not address the question. Further, a new state statute (California Code of Civil Procedure § 527.3) not effective until after the Union's position was presented to the California Supreme Court and therefore not brought to the attention of either the Court of Appeal or the Supreme Court suggests that even if the injunction was valid when entered, it was improper by the time of the California Supreme Court decision.

We therefore summarize below the state of the pertinent California law, not for the purpose of *proving* that the Union's activity was not actionable under state law, since this Court could not determine that state law point in any event, but in order to demonstrate that it is quite possible —indeed, probable—that if the case were remanded to decide the "antecedent state law question" (*Garmon*, 359 U.S., at 239), it would turn out that there is no federal question in this case.

This summary is instructive also, we submit, in that it fills a void left by petitioner's brief. To support its position, petitioner discourses at length (Pet. Br., 8-11) on the basic state interest in protecting private property, and the connection of trespass law to preventing violence which might occur in support of property rights. Not surprisingly this treatise is entirely devoid of any material showing that *California* regards the protection of private *commercial* property sought here, as a basic state interest. For as we now show, California has, as a matter of state law, subju-

gated the use of private commercial property to state control to further various public interests, including the interest in free use of economic weapons in labor disputes, and created exceptions to its trespass law for that purpose.

(a) First, while petitioner presents California Penal Code §§ 602(k) and (l)[1] as the statutory basis for the injunction (Pet. App. F), those sections were not in fact violated, and the section which might otherwise be pertinent, § 602(n), contains an express exception seemingly

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[1] Section 602 prohibits:

"(k) Entering any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or entering upon uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering such lands without the written permission of the owner of such land, his agent or of the person in lawful possession, and

(1) Refusing or failing to leave such lands immediately upon being requested by the owner of such land, his agent or by the person in lawful possession to leave such lands, or

(2) Tearing down, mutilating, or destroying any sign, signboard, or notice forbidding trespass or hunting on such lands, or

(3) Removing, injuring, unlocking, or tampering with any lock on any gate on or leading into such lands;

(4) Discharging any firearm;

"(l) Entering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof."

[2] Section 602(n), enacted in 1970, prohibits:

"(n) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by a peace officer *and* the owner, his agent, or the person in lawful possession thereof." (Emphasis supplied.)

applicable to these facts.[2] While the Sears property is posted with "signs stating that solicition and distribution of handbills is prohibited without prior permission of the store manager" (App. 14),[3] there are no "signs forbidding trespass" such as are required by § 602(k), and, obviously, Sears does not require "written permission of the owner" (§ 602(k)) before permitting entry onto its property. And, § 602(l) pertains only to "entering *and occupying* real property" (emphasis supplied); this prohibition has been construed by the California courts to make clear that "occupying" does not mean merely "remaining" but, rather engaging in "a non-transient, continuous type of possession." (*People* v. *Wilkinson*, (1967) 248 Cal. App. 2d 246, 56 Cal. Rptr. 261.)[4]

Section 602(n), enacted after the other two sections, does

[3] Sears' representation that the "property is posted against use by other than Sears' customers" (Pet. Br., 3) is not accompanied by any citation to the record, and we can find no record support for the statement.

[4] "The purpose of the legislature in passing subdivision (*l*) of the trespass law is quite clear. It intended the word 'occupy' to mean a non-transient, continuous type of possession. • • • [Otherwise] many another verb could have been used in place of 'occupy' to express an intention of preventing such transient use of so small an area, e.g., be, remain, loiter, tarry, camp, stay, and probably many more. Having in mind the legislative purpose in passing subdivision (l) of Section 602, it is rather obvious that some degree of dispossession and permanency be intended.

"Certainly if transient and insubstantial use • • • is covered by Penal Code § 602(l), then many of the other subdivisions of that section, as well as the later adopted 602.5 (1961) would be unnecessary. • • • Note that 602(l) covers 'structures' as does 602.5, but that the former uses 'entering *and occupying*' and the latter uses 'enters *or remains*'." (248 Cal. App. 2d, at 249, 56 Cal. Rptr., at 264.)

prohibit "refusing to • • • leave land • • • belonging to another." But, it does not apply to land "open to the general public," as was Sears' property; and, it seemingly applies only if the person is "requested to leave by a peace officer" as well as by the owner or manager.[5] Here the Union pickets were never asked to leave by any public official.

(b) Not only is the statutory basis for the injunction mysterious,[6] but even if the pickets' actions were other-

[5] See also *In re Cox*, (1970) 3 Cal. 3d 205, 219, 90 Cal. Rptr. 24, 33, holding that state law does necessarily not forbid a person from remaining on business premises generally open to the public even if requested by the owner to leave.

[6] Another section of § 602, upon which petitioner does not rely, seems on its face to be possibly applicable but, given the interpretation of the state courts, clearly is not. Section 602(j) prohibits:

> "(j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession"

In a case involving the handing out of leaflets and the display of informational placards on private property, the California Supreme Court ruled that there could be no "obstructing [of any lawful business] in the absence of any physical 'obstruction'", as long as "members of the public who wished to [engage in the business on the location] 'could do so freely.'" (*In re Wallace*, (1970) 3 Cal. 3d 289, 295, 90 Cal. Rptr. 176, 180.) Mere inconvenience to the public does not constitute obstruction. (*Id.*) (Compare *In re Ball*, (1972) 23 Cal. App. 3d 380, 100 Cal. Rptr. 189 (a violation of § 602(j) did exist where location of demonstrators was such that passengers of tram could not disembark).) Here, there is no allegation at all that the location of the pickets physically obstructed customers, employees, or delivery persons from entering and using Sear's property as usual if they wanted to, and § 602(j) is therefore not pertinent.

wise within the trespass statutes cited by petitioner they would not be unlawful because of exceptions in the California trespass laws for participants in union-employer disputes. Section 555 of the California Penal Code is a special, more stringent trespass statute applicable to certain kinds of industrial property, posted in a particular fashion; as to such property, mere entry without written permission is prohibited.[7] (See Cal. Pen. Code §§ 553, 554, & 555.) However, § 552.1 provides a specific exemption from this prohibition "for the purpose of carrying on the lawful activities of labor unions, or members thereof." (See also § 555.2) The California Supreme Court, recognizing that it would be anomalous to have a labor dispute exception to the trespass statute applicable only to property the legislature was *most* concerned to protect from unauthorized entry, has viewed § 552.1 as applicable to any trespass action not only those which would otherwise come within § 555. "[T]he legislature in dealing with trespasses has specifically subordinated the rights of the property owner to those of persons engaged in lawful labor activity." (*Schwartz-Torrance Inv. Corp.* v. *Bakery & Conf. Workers*, (1964) 61 Cal. 2d 832, 833, 40 Cal. Rptr. 233, 234;[8] see also *In re Zerbe*, (1964) 60 Cal. 2d 650, 36 Cal. Rptr. 286.[9]) Thus,

[7] In contrast as we have seen (pp. 12-13), mere entry on a commercial property without more, is not a violation of any portion of § 602.

[8] Other aspects of *Schwartz-Torrance* are based upon constitutional doctrine, overruled as to the federal constitution in *Hudgens* v. *NLRB*, 424 U.S. 507. The portion quoted in the text, however, is plainly an interpretation of statutory law.

[9] The Court of Appeal viewed § 552.1 as inapplicable to this case because it is "applicable only to posted industrial property," citing as authority for this limitation *Cotton* v. *Superior Court*,

> ..."in furtherance of the established policy of [California] to have labor conflicts settled by the free interaction of economic forces, conduct of various types has been treated as a proper means of obtaining a valid labor objective even though the conduct would be considered unlawful in the absence of a labor dispute." (*In re Zerbe*, 60 Cal. 2d, at 653, 36 Cal. Rptr., at 289.[10])

(c) Assuming that the California Supreme Court did not regard the above analysis as dispositive of whether any trespass had occurred, that court would be constrained, we believe, to rule, under a statute effective January 1, 1976, that the injunction issued was nonetheless invalid insofar as it survived after 1975, and that no similar injunction could issue in the future. For, California Code of Civil Procedure § 527.3 currently provides that:

> "[N]o court nor any judge nor judges thereof, shall have jurisdiction to issue any restraining order * * * which * * * prohibits any person or persons * * * from * * *:
>
> (1) Giving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be,

(1961) 56 Cal. 2d 459, 15 Cal. Rptr. 65. (Pet. App. A12.) But that court in so holding ignored *In re Zerbe* and *Schwartz-Torrance*, both decided *after Cotton* and both holding the exemption applicable to other than posted industrial property. *Schwartz-Torrance*, indeed, involved "commercial property used for retail sales" (Pet. App. A12) as does this case.

[10] See Cal. Labor Code § 923; *Petri Cleaners, Inc.* v. *Automotive Employees*, (1960) 53 Cal. 2d 455, 2 Cal. Rptr. 470, *Messner* v. *Journeyman Barbers*, (1960) 53 Cal. 2d 873, 4 Cal. Rptr. 179.

or by any other method not involving fraud, violence or breach of the peace.

(2) Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers."[11]

The mandate of the statute seems plain: whether or not labor picketing is ultimately determined to be legal, California courts may not *enjoin* such picketing as long as it is peaceful and not disruptive. (See also § 527.3(e).) The legislature specified the reasons for this rule as follows:

"(a) The status quo cannot be maintained but is necessarily altered by the injunction.

• • •

(c) The error in issuing the injunctive relief is usually irreparable to the opposing party.

(d) The delay incident to the normal court of appellate procedure frequently makes ultimate correction of error in law or in fact unavailing in the particular case." (Section 1, California Stats. 1975, c. 1156.)

The broad statutory language does not state *explicitly* that it applies to picketing on private property. But it does not state otherwise, and there are several reasons why the California courts are unlikely to read such an exception into the statute.

First, subsection (1) clearly applies in some instances to private property, since it specifies that *both* patrolling "on any public street" *and* patrolling "any place where any person or persons may lawfully be" may not be enjoined. In light of the decisions in *Schwartz-Torrance* and *In re Zerbe*, it appears that the intent is to prohibit injunctions against peaceful picketing at a location, like Sears' property, open to the general public.

[11] Subsection (4) of the statute defines a labor dispute so as to make clear that the statute is applicable to the dispute between Sears and the Union.

Moreover, subsection (1) applies as long as there is no "fraud, violence or breach of the peace." The legislature could have specified trespass, but did not. (See also 527.3(e).)

Third, subsection (2), which applies particularly to picketing, has *only* the limitation that the picketing be "peaceful." Thus, it appears that even more protection from injunctions is given to picketing than to other kinds of publicity.

Finally, the legislature specifically directed that "the provisions of [the statute] • • • shall be strictly construed • • • with the purpose of avoiding any unnecessary interference in labor disputes." (§ 527.3(a).) In light of this directive and of the reasons given by the legislature for avoiding injunctions in labor disputes (see p. 16, *supra*), any doubts as to whether an asserted trespass without more would constitute an exception to the application of the statute will almost certainly be resolved against finding an exception. For, both state (see pp. 11-15, *supra*) and federal law[12] clearly permit peaceful labor picketing on private commercial property in *some* instances. Since the California legislature was particularly concerned, in enacting § 527.3, with the fact that any errors in issuing injunctions in labor disputes are not reparable, it must be taken to have intended to apply that policy to an area in which an erroneous injunction would have precisely the

[12] See pp. 23-27, *infra*.

effect feared—interfering in union activity later determined to have been proper, and thus altering beyond retrospective repair the balance of legitimate economic weapons in a labor dispute.

3. The situation, then, is that the California Court of Appeal, which did decide the state law question, relied upon a plainly superseded precedent; the California Supreme Court did not address the state law questions at all; and a statute which became effective after the Union's final brief to the California Supreme Court and which no state court considered probably renders the injunction, and similar injunctions, ineffective as to the future even if it was proper when entered.[13] To determine the question presented by petitioners while the case is in this posture could be, as *Garmon* pointed out, to resolve a possible conflict between state and federal law which may not in fact exist. Unless, upon remand, the California Supreme Court decides that the injunction issued was proper, remains proper, and would be proper if the same circumstances arose again, this case "[does] not present the threat of grave state-federal conflict that [this Court] need sit to resolve," (*Taggart* v. *Weinacker's*, 397 U.S. 223, 225).

II.

1. Recalling some history regarding the development of the current preemption law is a useful beginning to the dis-

[13] The California appelate courts, like the federal courts, in reviewing a lower court order look to the presently existing law not to the law as it stood at the time the order was issued. (See *Kash Enterprise Inc.* v. *City of Los Angeles*, (1977) 19 Cal. 3d 294, 302 n.6, 138 Cal. Rptr. 53, 61 n.6; compare, *Fusari* v. *Steinberg*, 419 U.S. 379, 387.)

cussion of Sear's contention that the states' interest in enforcing their trespass laws comes within an exception to *Garmon* which preserves to the states the right to regulate activity which "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (359 U.S., at 244.)

Prior to *Garmon*, *Garner* v. *Teamsters Union*, 346 U.S. 485, had settled the point that the states cannot *enjoin* peaceful picketing regulated by the Act:

> "[W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent. It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the national Labor Management Relations Act, would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing. To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the State's temporary injunction will be dissolved as soon as the federal Board acts. But experience gives no assurance of either alternative, and there is no indication that the statute left it open for such conflicts to arise.
>
> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to

condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." (*Id.* at 498-500, footnote omitted.)

The open question answered in *Garmon* was whether state courts can award *damages* for peaceful picketing which is regulated by the NLRA. (See 359 U.S., at 244.) The Court divided 5-4 in ruling that the states may not through damage suits regulate peaceful picketing which is arguably prohibited. The five man majority and the four concurring Justices agreed, however, that if "the Union's actions for which the State has awarded damages may fairly be considered protected under the Taft-Hartley Act, *** state action is precluded *** [and] it makes no difference [if] the Board [does not] exercise its jurisdiction." (*Id.*, at 249 (Harlan, J., with whom Clark, J., Whittaker, J., and Steward, J., joined, concurring).) The concurring Justices in *Garmon* explained why pre-emption of state jurisdiction in "arguably protected" cases is absolutely central to a uniform federal labor policy:

> "The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power." (*Id.*, at 250.)

2. From the first then it has been understood that the

primary office of the preemption doctrine is to assure that the states do not enjoin picketing arguably protected by federal labor policy. The development of the exceptions to the *Garmon* doctrine has been consistent with this understanding. Just last term Mr. Justice Powell reviewed these exceptions and stated the standard for determining when the NLRB has exclusive primary jurisdiction and when it does not:

> "[B]ecause Congress has refrained from providing specific directions with respect to the scope of pre-empted state regulation, the Court has been unwilling to declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions. . . ." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 289 (1971). Judicial experience with numerous approaches to the pre-emption problem in the labor law area eventually led to the general rule set forth in *Garmon*, 359 U.S., at 244, and recently reaffirmed in both *Lockridge*, 403 U.S., at 291, and *Lodge 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employment Relations Commission*, [427 U.S. 132] (1976).
>
> "[T]he same considerations that underlie the *Garmon* rule have led the Court to recognize exceptions in appropriate classes of cases. * * *
>
> "These exceptions in no way undermine the vitality of the pre-emption rule. [*Vaca* v. *Sipes*, 386 U.S. 171, at 180.] To the contrary, they highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for intereference with the federal regulatory scheme.
>
> "The nature of the inquiry is perhaps best illustrated by *Linn* v. *Plant Guard Workers*, 383 U.S. 53. * * *

First, the Court [in *Linn*] noted that the underlying conduct—the intentional circulation of defamatory material known to be false—was not protected under the Act, 383 U.S., at 61, and *there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect.*

• • •

"Similar reasoning underlies the exception to the pre-emption rule in cases involving violent tortious activity. Nothing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute, *Automobile Workers* v. *Russell*, 356 U.S. 634, 640, (1958); *id.*, at 649, (Warren, C. J., dissenting); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 666, 98 L Ed 1025, 74 S Ct 833 (1954), and *thus there is no risk that state damage actions will fetter the exercise of rights protected by the NLRA.*" (45 L.W. at 4265-4266; emphasis supplied.)

Thus, the first precondition to state jurisdiction is that there be "no risk that permitting the state cause of action to proceed would result in regulation of conduct that Congress intended to protect."

Moreover, while satisfaction of that condition is necessary to establish a *Garmon* exception it is not sufficient. In addition, as the *Farmer* Court noted, there must be:

> "little risk that the state cause of action would interfere with the effective administration of national labor policy. [In the situation presented in *Linn*, for example, the] Board's § 8 unfair labor practice proceeding would focus only on whether the statements were misleading or coercive; whether the statements also were defamatory would be of no relevance to the Board's performance of its functions. *Id.*, at 63. Moreover, the Board would lack authority to provide the defamed individual with damages or other relief. *Ibid.* Conversely, the state law action would be unconcerned with whether the statements were coercive or misleading in the labor context, and in any event the court would have power to award Linn relief only if the statements were defamatory. Taken together, these factors justified an exception to the pre-emption rule." (45 L.W., at 4265-4266.)

The "concerns of the federal scheme and the state tort law" must be "discrete" in the sense that the elements of the state cause of action "would play no role in the Board's disposition of a case" properly before the agency, and "[c]onversely the state court tort action can be adjudicated without resolution of the merits of the underlying labor dispute." (*Id.*, at 4267.)

3. It is patent that neither of these preconditions to state jurisdiction obtain here.

First, this is not a case in which there is "no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect" (*Farmer*, 45 L.W. at 4265). To the contrary, the decisions of this Court and the Board demonstrate that it is far more probable than not that the picketing enjoined is protected by the Act.

The NLRA regulates in detail labor disputes such as that between Sears and the Union over the carpentry work at the Company's Chula Vista store. Sections 7 & 13 safeguard the Union's right to picket to protect its "area standards" conditions. (See *Houston Building & Construction Trades Council (Claude Everett Construction Co)*, 136 NLRB 320.) On the other hand, § 8(b)(7) limits the

right to picket for recognition and § 8(b)(4)(D) prohibits picketing to force a work reassignment during a jurisdictional dispute. And, from what Sears did and did not do, the fair inference is that the Union's picketing in this case did meet the Act's requirements. For the Company sought a state court order removing the pickets to a more distant location but did not even file a charge with the Board despite the fact that a meritorious charge would lead to an order banning the picketing completely.

The Act does not merely grant a right to engage in "lawful primary economic picketing" (such as "area standards" picketing) somewhere. Rather, §§ 7 & 13 grant the precise "right to picket immediately in front of" the premises at which the labor dispute occurs and not at "such a distance from the focal point [of the dispute] *** that a message announced orally or by a picket sign *** would be too greatly diluted to be meaningful." For the pickets have the "right to communicate their message both to persons who would do business with the *** employer [involved in the dispute,] *** [a] group *** [which] bec[omes] established as such only when individual shoppers decide to enter the [employer's] store [,] *** and to [his] employees." (*Scott Hudgens*, 230 NLRB No. 73, 95 LRRM 1351, 1353-1354.)

In *Scott Hudgens* the Board ruled in certain circumstances this picketing right subordinates the property right of the owner of the "privately owned *** walkways *** essentially open to the public [and] the equivalent of sidewalks" at the entrance to a store which is the scene of the labor dispute. (*Id.*, at 1354, 1355.) In so doing the Board was implementing this Court's mandate in *Hudgens* v. *NLRB*. For, as Mr. Justice Stewart stated for the *Hudgens* Court:

> "*** Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights; 'and to seek a proper accommodation between the two.' *Central Hardware Co.* v. *NLRB*, 407 U.S., [539] at 543. ***
>
> "In the *Central Hardware* case, and earlier in the case of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, the Court considered the nature of the Board's task in this area under the Act. Accommodation between employees' § 7 rights and employers' property rights, the Court said in *Babcock & Wilcox*, 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.' 351 U.S., at 112.
>
> "Both *Central Hardware* and *Babcock & Wilcox* involved organizational activity carried on by nonemployees on the employers' property.[10] The context of the § 7 activity in the present case was different in several respects which may or may not be relevant in striking the proper balance. First, it involved lawful economic strike activity rather than organizational activity. See *Steelworkers* v. *NLRB*, 376 U.S. 492, 499; *Bus Employees* v. *Missouri*, 374 U.S. 74, 82; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 234. Cf. *Houston Insulation Contractors Assn.* v. *NLRB*, 386 U.S. 664, 668-669. Second, the § 7 activity here was carried on by Butler's employees (albeit not employees of its shopping center store), not by outsiders. See *NLRB* v. *Babcock & Wilcox Co.*, *supra*, at 111-113. Third, the property interests impinged upon in this case were not those of the employer against whom the § 7 activity was directed, but of another.[11]
>
> "*** The locus of [the required] accommodation *** may fall at differing points along the spectrum de-

pending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. See *NLRB* v. *Babcock & Wilcox, supra*, at 112; cf. *NLRB* v. *Eric Resistor Corp., supra* at 235-236; *NLRB* v. *Truckdrivers Union*, 353 U.S. 87, 97. 'The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.' *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266.

> "[10] A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793. This difference is 'one of substance.' *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113.
>
> "[11] This is not to say that Hudgens was not a statutory 'employer' under the Act. See n. 3, *supra*."

(424 U.S., at 521-523.)

We believe that the instant case and *Hudgens* are alike in the essentials identified by the Board—the physical location (a shopping place separated from public thoroughfares by extensive parking lots), the type of § 7 activity involved (the exercise of the statutory right to picket an employer with whom the pickets have a labor dispute), and the adverse effect on that § 7 right of shifting the picketing from the walkways generally open to the public at the focal point of the dispute to a location so distant that the message is too greatly diluted to be meaningful. But we recognize that the Board's *Hudgens* decision on remand has not yet been "subject to review by the courts" (*Hudgens*, 424 U.S. at 521). And, we understand that as

Hudgens "was different [from *Central Hardware* and *Babcock & Wilcox*] in several respects which may or may not be relevant in striking the proper balance" (*id.*, at 522), so this case and *Hudgens* are not identical. Nevertheless we submit that the similarities are so compelling as to make it plain that this case and *Hudgens* are examples of the same "generic situation" (*id.*). It is for that reason that we say with confidence that it is far more probable than not that the picketing enjoined here is protected by the Act. And, as the Court stressed in *Garner*:

> "[T]he policy of the Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." (346 U.S. at 499-500.)

Second, as opposed to the filing of a damage suit for malicious libel or for outrageous conduct that causes grievous harm as in *Linn* and *Farmer* when an employer files a trespass action, "the state court tort action can [not] be adjudicated without resolution of the 'merits' of the underlying labor dispute," (*Farmer*, 45 L.W. at 4267). The possibility of separating the Board's function from that of the state court so that "there [is] little risk that the state cause of action would interfere with the effective administration of national labor policy [because] the [state] action can be resolved without reference to any accommodation of the special interests of unions [and employers]" (*id.*, at 4266, 4267) simply does not exist. For, in this context, there are no "discrete concerns of the federal scheme and the state *** law" (*id.* at 4267). The federal scheme encompasses a concern for property law, and subjects that concern to a balancing test against federal interests in the

course of determining the federal right. The state court would therefore have to decide the federal question *in toto* before considering the state law problem.

The attempt of the California Court of Appeal in this case to decide that question demonstrates the wisdom of the *Garmon* rule. For, that court, inexperienced in federal labor relations law, viewed *Central Hardware* as controling even though, as this Court noted in *Hudgens*, *Central Hardware* involved organizational activity rather than consumer picketing. (See 424 U.S. at 521-522.) And, that court saw no relevant distinction whatever as regards § 7 rights between picketing directly in front of a store and picketing at the entrance to a parking lot several hundred feet from the store, where consumers could only see the pickets fleetingly as they drove by. Yet, the Board in *Scott Hudgens* recognized that the distance of picketing from a store entrance can be critical to its effect, because "a message announced orally or by picket sign at *** a [substantial] distance from the focal point would be too greatly diluted to be meaningful." (95 LRRM, at 1354.)

It is no discredit to state courts to recognize that they are not familiar with federal labor policy or the distinctions relevant to its protections, and are therefore likely, as the Court of Appeal was here, to ignore critical factors and misinterpret important precedents. It is for this reason that Congress committed federal labor policy in this regard to an expert administrative agency, and it is for this reason that any exceptions to that rule must, as *Farmer* held, be limited to situations in which the uniformity of that federal policy is not endangered.

In *Hudgens* this Court declined to make the accommoda-

tion of § 7 rights and private property rights" called for by the Act, emphasizing that the "primary responsibility for making this accommodation must rest with the Board in the first instance." (424 U.S., at 522.) As Mr. Justice Frankfurter had stated in *Garmon*:

> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board." See, e.g., *Garner* v. *Teamsters Union*, 346 U.S. 485, especially at 489-491; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468." (359 U.S., at 244-245.)[14]

[14] While we believe that two of the contentions upon which the petitioner places heavy weight are plainly insubstantial, to conclude our analysis we answer each.

First, Sears argues that under *Garmon* the states' interest in "preventing *possible* breaches of the peace or public disorders" is overriding. (Pet. Br., 10; emphasis supplied.) If that were the law the *Linn* Court would not have "held that state [libel] damage actions in [the labor] context *** escape pre-emption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity." (*Farmer*, 45 L.W. at 4266.) For the preempted portion of the state libel laws, no less than the state trespass laws governing commercial property open to the public generally, is addressed to preventing possible breaches of the peace. Nevertheless those libel laws were preempted in part to "minimize the possibility that state libel suits would either dampen the free discussion characteristic of labor disputes or become a weapon of economic coercion." (*Id.*) The considerations of federal labor policy requiring a partial preemptions of the state trespass laws are at least as weighty. And, of course, the states' authority

to deal with the use of actual force or violence by the pickets remains. As the Kansas Court of Appeals has just explained:

"In *Youngdahl* v. *Fainfair, Inc.*, 355 U.S. 131, (1957), the Supreme Court held that a state court may lawfully enjoin a union from threatening or provoking violence and from obstructing or attempting to obstruct the free use of streets adjacent to the employer's place of business, and the free ingress and egress to and from that property. However, it held that a state court cannot lawfully enjoin a union from 'all picketing or patrolling' of those premises. We believe that the answer to our problem may be found in *Youngdahl* when considered together with the other decisions of the Supreme Court which are discussed above. We have concluded that a state court has the power to enjoin trespassory picketing only where there is shown to be actual or some obstruction to the free use of property by the public which immediately threatens public health or safety or which denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business. Unless the evidence establishes that these elements are present, a state court should not take jurisdiction in actions seeking injunctive relief in cases of peaceful trespassory picketing. Such controversies should properly be left for determination by the NLRB which has been given the authority to resolve conflicts between Sec. 7 rights and private property rights. (*Hudgens* v. *NLRB*, supra.)" (*Shirley* v. *Retail Store Employees Union*, ... Kan. ....., 95 LRRM 2817, 2821.)

This brings us to petitioner's related contention that the California Supreme Court's decision creates a "no man's land" in which unions *inter alia* "could picket inside the Sears' store." (Pet. Br. 15.) Again, *Linn* provides the answer.

The parallel to the Board cases which did not protect malicious defamation, and which justified the preservation of a state cause of action in *Linn*, is to be found in such cases as *Labor Board* v. *Fansteel Mfg. Co.*, 306 U.S. 240, and *Marshall Field Co.* v. *NLRB*, 200 F.2d 375 (C.A. 7), which held, respectively, that a sit-in at an employer's plant and union solicitation in certain areas of a department store were not protected under § 7. Even as preservation of state actions for malicious defamation was held in *Linn* to be consistent with the former set of Board cases, so state action for trespass in a *Fansteel* or *Marshall Field* situation would be consistent with federal law, and in our view, permissible. But the point

III.

In the concluding section of its brief Sears argues that the states should have concurrent jurisdiction over cases such as the instant one because "if denied access to state courts, an owner has no remedy for illegal trespass." (Pet. Br., 14-18.) That is not an argument from *Garmon* and its progeny but an argument for an overruling of the portion of the *Garmon* doctrine providing that when "it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 . . . due regard for the federal enactment requires that state jurisdiction must yield." (359 U.S., at 244.) As Mr. Justice Harlan noted in his separate memorandum in *Taggart* v. *Weinacker's, Inc.*, 397 U.S., at 230:

"While I recognize THE CHIEF JUSTICE's and MR. JUSTICE WHITE's concern over the hiatus created when the Board does not or cannot assert its jurisdiction, see the concurring opinion of THE CHIEF JUSTICE, *ante*, p. 227, and the concurring opinion of MR. JUSTICE WHITE in *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, *ante*, p. 201 (decided today); see also Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity, 83 Harv. L. Rev. 552 (1970), that consideration is foreclosed, correctly in my view, by *Garmon*. Congress is the National Labor Relations Act erected a comprehensive regulatory structure and made the Board its chief superintendent in order to assure uniformity of application by an

of *Farmer* (45 L.W., at 4266)—"that the scope of [the] exemption" granted must be "limit[ed]" to "[m]inimize the possibility" of interference with the federal scheme—is also applicable here. To allow state trespass laws to prevent picketing at the locations the federal law specifies as proper would be to frustrate the Act's determination to permit the use of that economic weapon.

> experienced agency. Where conduct is 'arguably protected,' diversity of decisions by state courts would subvert the uniformity Congress envisioned for the federal regulatory program. In the absence of any further expression from Congress I would stand by *Garmon* and foreclose state action with respect to 'arguably protected activities,' until the Board has acted, even if wrongs may occasionally go partially or wholly unredressed."

In the seven years since *Taggart* this Court has on three occasions considered invitations to modify or overturn the *Garmon* doctrine. The upshot, as Mr. Justice Powell stated just last term, has been that "the general rule set forth in *Garmon*, 359 U.S., at 244" has been "recently reaffirmed in both [*Motor Coach Employees* v.] *Lockridge*, 403 U.S. [274] at 291, and *Lodge 76, International Association of Machinists and Aerospace Workers* v. *Wisconsin Employe Relations Comm'n.*, [427 U.S. 132]." (*Farmer*, 45 L.W. at 4265.) Justice Harlan's call to "stand by *Garmon* and foreclose state action with respect to 'arguably protected' activities" (*Taggart*, 397 U.S., at 230), seconded by his demonstration in *Lockridge* (403 U.S., at 285-291) of the compelling case for *Garmon*, has carried the day.

Sears' brief adds nothing to the debate that has not already been advanced and rejected during the searching recent reexamination and reaffirmation of *Garmon*. And, we are frank to admit that we can add nothing to the majority opinions in *Lockridge*, *Machinists* and *Farmer*. But it is worthwhile, we believe, to conclude by noting that even if the Court were to decide to treat with Sears' contention as *res nova* and to conclude that the interest in assuring employers a forum in a case such as this should be given greater weight than it is presently afforded, that conclusion

does not lead to the concurrent jurisdiction rule sought by Sears. The employers' interest in a hearing can be served without disturbing the rule that "while the Board's decision is not the last word, it must assuredly be the first" (*Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 185).

Our suggestion in this regard is that at the least state jurisdiction to enjoin alleged trespasses should be preempted where peaceful picketing by a union takes place on privately owned walkways at the entrance to premises which are widely separated from the nearest publicly owned walkways, and where the owner is the employer (or his lessor) involved in a labor dispute with that union, so long as the union responds to an employer who believes that the picketing at that location is not protected by federal law and who demands that the pickets leave, by filing a § 8(a)(1) charge against the employer with the NLRB, thereby assuring *Board* consideration of the employers' contention. If, on the other hand, the union does not file a charge upon the demand to leave, or if the charge is resolved by a General Counsel dismissal which is "illuminated by [an] explanation that * * * squarely defines" the picketing as unprotected (*Hanna Mining*, 382 U.S., at 192), or by a final decision on the merits to that effect, the employer would be free to invoke the state trespass law.

This suggestion, we submit, goes to the very outer limits of deference to the employer interest in a hearing on his trespass claim. For, it would be an intolerable interference with the federal scheme to permit in cases such as this the various states in the first instance to work out as they see fit the "accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other'" called for in *Hudgens* v.

NLRB, 424 U.S., at 522. There is a strong probability that the picketing is protected and that the employers' claim of an illegal trespass is therefore without merit. (See pp. 23-31, *supra*, discussing the *Scott Hudgens* case.) And, as we have stressed, "the greatest threat against which the *Garmon* doctrine guards [is] a state's prohibition of activity that the Act indicates must remain unhampered," (*Hanna Mining*, 382 U.S. at 193). Moreover, since the "locus of the [required] accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context" (*Hudgens*, 424 U.S. at 522), this is assuredly the paradigm case for application of the lesson of *Lockridge*:

"The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good. The principle of pre-emption that informs our general national labor law was born of this Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes in order to preclude, so far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme." (403 U.S., at 286; footnote omitted.)

To be sure, in order to initiate the Board proceeding envisioned here, the employer must take an action (demanding that the pickets leave) that may constitute a § 8(a)(1) violation. (See *Scott Hudgens*, 95 LRRM at 1355.) But as the Court said in *Garment Workers v. Labor Board*, 366 U.S. 731, 739-740, "this places no particular hardship on the employer * * *. [N]o penalty is attached to the violation * * *. If he is found to have erred * * * he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act * * *."

It is also true that the burden of the delay inevitable when a dispute is resolved through an administrative or judicial proceeding will, under our suggestion, rest on the employer. Balancing the respective interests that is where the burden should rest. The federal interest served by requiring prior resort to the Board is assuring the "freedom of labor to use the weapon of picketing" so long as that picketing has not been "ascertained by [the Act's] prescribed processes to fall within its prohibitions." (*Garner*, 346 U.S. 499-500.) And, there is a strong probability that in the situation presented here a state court injunction prior to a Board determination would improperly interfere with picketing the Act's prescribed process would declare to be outside those prohibitions and within that freedom. The interest on the other side is the employer's property interest. The California Supreme Court did not denigrate that interest but rather accurately described the realities when it stated that the employer's "property right" is one "worn thin by the public usage." (*Schwartz-Torrance*, 61 Cal. 2d, at 835, 40 Cal. Rptr., at 236.) "[U]nlike a situation involving a person's home no meaningful claim to protect the right of privacy can be advanced by [the em-

ployer]. Nor * * * can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." (*Food Employees v. Logan Plaza*, 391 U.S. 308, 324.)[15] The Act, as this Court early recognized, contemplates the "[i]nconvenience, or even some dislocation of property rights" (*Republic Aviation Corp. v. Board*, 324 U.S. 793, 802, n.8.) It is difficult to conceive of a more marginal or, as we have shown, a more necessary, inconvenience than that suggested here.

[15] While *Hudgens* overruled the constitutional doctrine stated in *Logan Valley*, it did so on the ground that the private title was sufficient to make controlling the "commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government" (424 U.S. at 513), and not on the ground that *Logan Valley* had mischaracterized the weight to be given the property right in a statutory balancing test such as that called for by the NLRA.

CONCLUSION

For the above-stated reasons the instant case should either be remanded to the Supreme Court of California for a determination as to whether the injunction issued here is proper under state law or the decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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